IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP Nos. 312/05, 313/05, 315/05, 316/05, 317/05 and 418/07

Judgment reserved on: 7.11.2007

Date of decision: 06.12.2007

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1. CWP No. 312 of 2005
Narender Dutt Sharma **..Petitioner**

Versus

State of H.P. and others **..Respondents**

2. CWP No. 313 of 2005
Dharmender Dutt Sharma **..Petitioner**

Versus

State of H.P. and others **..Respondents**

3. CWP No. 315 of 2005
Narender Kumar **..Petitioner**

Versus

State of H.P. and others **..Respondents**

4. CWP No. 316 of 2005
Dharmesh Kumar Gupta **..Petitioner**

Versus

State of H.P. and others **..Respondents**

5. CWP No. 317 of 2005
Mohan Singh Guleria **..Petitioner**

Versus

State of H.P. and others **..Respondents**

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6. CWP No. 418 of 2007
Manmohan Bedi ..Petitioner

Versus

State of H.P. and others ..Respondents

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The Hon'ble Mr. Justice Deepak Gupta, ACJ

The Hon'ble Mr. Justice V.K.Ahuja, J.

Whether approved for reporting?[1]

For the Petitioner: S/Shri Ajay Mohan Goel and Surender Sharma, Advocates

For the Respondents: Mr. M.S.Chandel, Advocate General, with Mr. R.M.Bisht, Deputy Advocate General.

Per Deepak Gupta, ACJ.

The aforesaid batch of writ petitions is being disposed of by a common judgment since common questions of law are involved in the case. Though the petitioners had challenged the vires of various provisions of the H.P. Motor Vehicles Taxation Act, 1972 (hereinafter referred to as the Act) at the time of hearing of these petitions, they confined their challenge to the vires of Section 16(2) of the Act.

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment?***

The grounds of challenge are that the provisions of Section 16(2) are repugnant to the provisions of Section 192-A of the Motor Vehicles Act, 1988 (hereinafter referred to as the M.V. Act) enacted by the Parliament of India and as the provisions of State Act are repugnant to the provisions of Central Act, the same must be held to be ultra vires.

Entry No. 56 of List-II i.e. the State List of the Constitution of India empowers the State to levy taxes on goods and passengers carriage by road. Entry No. 57 empowers the State to levy taxes on all vehicles suitable for use on road subject to the provisions of entry No. 35 of List-III i.e. the concurrent list.

Entry No. 35 of the concurrent list empowers both, the State and the Union to make laws in respect of mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied. The Union in exercise of the powers vested in it under item No. 35 of the concurrent list has enacted the M.V. Act. This is both, a substantive and procedural law. Under Section 2, i.e. the definition section, various types of

vehicles have been defined including transport vehicles, contract carriage, stage carriages etc.

Chapter V of the Act relates to the control of transport vehicles.

Section 66 of the M.V. Act makes it mandatory for the owner of a motor vehicle to obtain a permit when he wants to use the vehicle as a transport vehicle for carriage of passengers or goods. This permit has to be granted by the Regional or State Transport Authorities. The various sections in Chapter V lay down the powers to be exercised by the State Government, the Transport Authorities, the provisions for application for permits, the procedure and rules to be followed for consideration and grant of such permits. The rules also provide for the mechanism of appeals, revisions etc. by an aggrieved party. Section 84 of the M.V. Act lays down the general conditions attaching to all permits. It reads as follows:-

> "84. **General conditions attaching to all permits.-** The following shall be conditions of every permit-
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> (a) that the vehicle to which the permit relates carries valid certificate of fitness issued under section 56 and is at all times so maintained as to comply with the requirements of this Act and the rules made thereunder;

(b) that the vehicle to which the permit relates is not driven at a speed exceeding the speed permitted under this Act;

(c) that any prohibition or restriction imposed any fares or freight fixed by notification made under section 67 are observed in connection with the vehicle to which the permit relates;

(d) that the vehicle to which the permit relates is not driven in contravention of the provisions of section 5 or section 113;

(e) that the provisions of this Act limiting the hours of work of drivers are observed in connection with any vehicle or vehicles to which the permit relates;

(f) that the provisions of Chapters X, XI and XII so far as they apply to the holder of the permit are observed; and

(g) that the name and address of the operator shall be painted or otherwise firmly affixed to every vehicle to which the permit relates on the exterior of the body of that vehicle on both sides thereof in a colour or colours vividly contrasting to the colour of the vehicle centered as high as practicable below the window line in bold letters."

Section 192-A of the M.V. Act provides the penalty for using a motor vehicle without permit or in

contravention of the conditions of the permit. It reads as follows:-

> **"192-A. Using vehicles without permit.-**(1) Whoever drives a motor vehicle or causes or allows a motor vehicle to be used in contravention of the provisions of sub-section (1) of section 66 or in contravention of any condition of a permit relating to the route on which or the area in which or the purpose for which the vehicle may be used, shall be punishable for the first offence with a fine which may extend to five thousand rupees but shall not be less than two thousand rupees and for any subsequent offence with imprisonment which may extend to one year but shall not be less than three months or with fine which may extend to ten thousand rupees but shall not be less than five thousand rupees or with both:
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> Provided that the Court may for reasons to be recorded, impose a lesser punishment.
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> (2) Nothing in this section shall apply to the use of a motor vehicle in an emergency for the conveyance of persons suffering from sickness or injury or for the transport of materials for repair or for the transport of food or materials to relieve distress or of medical supplies for a like purpose:
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> Provided that the person using the vehicle reports about the same to the Regional Transport Authority within seven days from the date of such use.

(3) The Court to which an appeal lies from any conviction in respect of an offence of the nature specified in sub-section (1), may set aside or vary any order, made by the Court below, notwithstanding that no appeal lies against the conviction in connection with which such order was made."

The State of Himachal Pradesh enacted the H.P. Motor Vehicles Taxation Act, 1972 which is an Act to impose tax on motor vehicles in the State of H.P. This Act has obviously been enacted under the powers vested in the State under entry 57 of the list 2 of the 7th schedule. Under this Act the State has levied tax at different rates on different types of vehicles. The tax is charged and has to be recovered in terms of this Act. The Act also provides for the recovery of tax, arrears of tax, penalty etc. Section 16 of the Act empowers the officers of the State to stop search and seize a vehicle. Section 16 reads as follows:-

"Section 16. Power to stop, search & seizure:

(1) Any officer of the State Government authorized by general or special order, in this behalf, by the Commissioner, may require the driver of any motor vehicle at any place to stop the motor vehicle and to cause it to remain stationary so long as may be reasonably necessary for the purpose of satisfying

himself that the amount of tax due in accordance with the provisions of this Act in respect of such vehicle has been paid.

(2) Where any tax due or any penalty, as the case may be, in respect of any motor vehicle, has not been paid, or where the vehicle is plied without a permit or in contravention of the conditions of the permit or a personal vehicle is used as a transport vehicle for hire or reward, any officer authorized under sub section (1), may seize and detain such vehicle and keep such vehicle in safe custody of the Officer-in-Charge of nearest police station or in any other place, as he may consider necessary for the safe custody of such vehicle, at the cost of owner of the vehicle, at the rates as may be prescribed and shall send information of such seizure to the taxation authority of the area concerned, within twenty four hours of seizure, to enable the concerned taxation authority to initiate action under section 7-A or 12 of this Act.

Provided that where the owner of such motor vehicle pays the tax due or penalty, as the case may be, during the period of seizure, the vehicle shall be ordered to be released and intimation thereof shall be sent to the concerned taxation authority.

(3) Any officer of the State Government referred to in sub-section (2) may, for the purpose of this Act enter at any time between sun-rise and sun-set in

> any premises where he has reason to believe that a motor vehicle is kept in contravention of the provisions of this Act."
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> **(emphasis supplied)**

A perusal of the aforesaid section reveals that in terms of sub section (1) any authorized officer may require a driver of any motor vehicle to stop the same to satisfy himself that the amount of tax due in respect of such vehicle has been paid. Section 2 empowers the authorized officer to seize the vehicle in case tax due and penalty has not been paid, to keep such vehicle in safe custody in the manner prescribed. Rules have been framed wherein the charges for keeping the vehicle in safe custody can be recovered from the owner. The challenge by the petitioners to this section is mainly on the ground that this section not only permits the officer to detain and seize the vehicle when any tax due or any penalty has not been paid, but even when the vehicle is plied without a permit or in contravention of the conditions of the permit or where a personal vehicle is used as a transport vehicle for hire or reward.

It is submitted on behalf of the petitioners that use of a vehicle without a permit or in contravention of the

provisions of the permit is an offence under Section 192-A of the M.V. Act which section also lays down the penalties for such offence. For the first offence, the penalty is only a fine which may extend upto Rs. 5,000/-, but cannot be less than Rs. 2,000/- and for subsequent offences imprisonment upto one year, but not less than three months and fine upto Rs. 10,000/-, but not less than Rs.5,000/- or both can be imposed. The court under Section 192-A has also been given the power to impose a lesser punishment for reasons to be recorded.

Mr. Ajay Mohan Goel, learned counsel appearing on behalf of the petitioners, has strenuously contended that the State Act which imposes much more stringent punishment is repugnant to the Central Act. It is further contended that when the field was covered by the Central Act, the State had no authority or power to enter into this domain without obtaining the assent of the President of India.

A bare perusal of Section 16(2) of the Act, quoted hereinabove, especially the portion which has been underlined, shows that the authorized officer has the power to detain the vehicle not only where any tax or any

penalty due in respect of any vehicle has not been paid, but even when the vehicle is plied without a permit or in contravention of the conditions of a permit and where a personal vehicle is used as a transport vehicle for hire and reward. All these would solely fall within the domain of the Central Act.

In fact this question is no longer res integra. The Apex Court in **M.P.AIT Permit Owners Association and another Vs. State of H.P. (2004) 1 SCC 320** was considering similar provisions of the M. P. Motoryan Karadhan Adhiniyam, 1991. In that case the provisions of Section 16(6) of the M.P. Act authorized the Taxation Authority to seize a vehicle if it was satisfied that the owner has committed an offence under Section 66 read with Section 192-A of the M. V. Act. It also empowered the authorized officer to confiscate the vehicle after hearing the parties. The court held as follows:-

> "14. In the case on hand the prescription of punishment is for the same offence arising under Section 66 read with Section 192-A of the M. V. Act and further punishment is prescribed under the State M.V. Taxation Act for forfeiture of the vehicle. Thus, there is clear conflict between the two enactments. Therefore, we hold that the provision of

> Section 16(6) of the Act and the consequential provisions thereto are repugnant to Section 66 read with Section 192-A of the M.V. Act and hence, invalid as the State law has not complied with the requirements under Article 254(2) of the Constitution of obtaining assent of the President to the State law.
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> 16. When the offences arising upon the Union law and the State law respectively are substantially identical, but additional penalties are imposed for the contravention by the provision of the State law, it would be inconsistent with the law of the Union and, therefore, invalid. In the instant case, apart from what is available under Section 192-A of the M.V. Act, there are additional penalties arising under Section 16(6) of the Act."

The present case is squarely covered by the aforesaid observations of the Apex court. In the present case also, as pointed above, the authorized officer has not only been given power to seize a vehicle when tax or penalty has not been paid, but even where the vehicle is plied without a permit or in contravention of the conditions of a permit. The State had no power to legislate in this behalf since the field was squarely covered by the Central Act i.e. the Motor Vehicles Act, 1988. Without complying

with the provisions of Article 254 and obtaining the assent of the President of India, the State could not have passed a law which was patently repugnant to the Central law.

It has been contended on behalf of the State that in case we strike down section 16(2) in totality, the authorized officer would have no right to seize a vehicle even when it is apparent that tax or penalty due has not been paid. It is submitted that a large number of contract carriage permit holders actually run their buses as stage carriages since the incidence of tax on contract carriages is much lower than on stage carriages. It is further contended that the purpose of the section is to ensure that the vehicles do not run without paying taxes.

The Transport Authorities of the State undoubtedly have the power to check a vehicle so as to ascertain whether payment of tax is being evaded. They can also be conferred the power to detain the vehicle. In **Hardev Motor Transport Vs. State of M.P. and others (2006) 8 SCC 613** the Apex Court considered the provisions of Section 16 of the M.P. Act, already referred to above. Section 16(3) empowered the Taxation Authority or any officer authorized by the State

Government in this behalf if he has reason to believe that a motor vehicle has been or is being used without payment of tax, penalty or interest due, to seize and detain such motor vehicle and to take the same in custody for realization of tax due. Section 16(4) of the M.P. Act provides that where a motor vehicle has been seized, the owner may apply to the Transport Authority for release of the same and if the Taxing Authority is satisfied on verification of tax that no amount of tax is due the vehicle may be ordered to be released. Under Section 16(5) even the power of the court to release the vehicle has been taken away unless the tax has been paid and the court can satisfy itself in respect of payment of tax only on receipt of the certificate issued by the Transport Authorities of the State. This wide power was upheld by the Apex Court in the aforesaid case.

However, there is a very important distinction between the M.P. Act and the H.P. Act. Under the M.P. Act the Authorized Officer or Taxation Authority who had been given the power to seize the vehicle must have reasons to believe that the vehicle is being used without payment of tax, penalty or interest. Section 16(2) does not

require the formation of any such prima facie opinion. However, we are not oblivious of the need of the State to ensure payment of tax due and in case vehicles are permitted to run without paying proper tax, it would lead to great loss to public exchequer. The rate of tax may vary keeping in view the nature of the vehicle and the use to which it is put. It is not in dispute that the petitioners herein have been granted permits for plying their buses on contract. The allegation of the State is that they are violating the terms and conditions of the permits by plying their buses as stage carriages. It is also not in dispute that the rate of tax on stage carriages is much more than that payable on contract carriages and according to the State the petitioners are avoiding tax by these deceptive means.

In view of the aforesaid discussion we feel that striking down Section 16(2) of the Act in its totality would aid the persons who are avoiding tax. Section 16 read as a whole clearly gives the power to stop, search and seize a vehicle to the authorized officer. This power has to be exercised only in respect of vehicles which have not paid the tax due or penalty which may be recoverable

from them. The authorities under the Taxing Statute have no right or jurisdiction to seize a vehicle for any other contravention of the provisions of the permit or of the use of the permit. However, if such contravention results in tax or penalty being recoverable, then the authority will have the power to seize the vehicle.

The Doctrine of Severability is a well established principle of interpretation of statutes. In **R.M.D. Chamarbaugwalla Vs. U.O.I. AIR 1957 SC** 628 the Apex Court had accepted the well known Doctrine of Severability and it was held that a statute can be held void to the extent of its inconsistency and it is not necessary to declare the entire statute to be void when only part of it is void. However, this can only be done when the valid and invalid portions of the statute are separable from each other. The intention of the Legislature must be taken to the determining factor. In the present case the stand of the State is that they had enacted this legislation only for the purpose of recovery of tax and even during the course of arguments, it has been urged that the intention of the legislature was only to ensure the recovery of the tax. In our opinion, the words

“or where the vehicle is plied without a permit or in contravention of the conditions of the permit or a personal vehicle is used as a transport vehicle for hire or reward” are totally contrary to the intention of the legislature inasmuch as they give power to the Authorized Officer to seize the vehicle even in case violation is of Section 192 of the Motor Vehicles Act and has no relation to the Taxing Act. Therefore, we feel that this portion **“or where the vehicle is plied without a permit or in contravention of the conditions of the permit or a personal vehicle is sued as a transport vehicle for hire or reward”** is the only portion of the Act which is beyond the legislative power of the State and is also inconsistent with the Central Act and, therefore, has to be struck down. The rest of the provisions of Section 16(2) are upheld. We, therefore, only strike down that portion of Section 16(2) which, according to us, is ultra vires the powers of the State and is repugnant to the Central Act.

We would, however, like to add one caveat and that is that while exercising power under Section 16(2), we will read into the Section the obligation on the part of the Authorized Officer to pass a reasoned order

while ordering the seizure or detention of any vehicle. Seizure or detention of a vehicle entails penal consequences and it is obvious that this penal power cannot be exercised without giving some sound reasons. Therefore, the Authorized Officer under sub section (1) while passing an order of seizure or detention under sub-section (2) of the Act must give reason(s) for doing so.

All the writ petitions are disposed of in the aforesaid terms with no order as to costs.

(Deepak Gupta), ACJ

December 6, 2007(K) (V. K. Ahuja), J.